Rule 19, Ariz. R. Crim. P.

ATTORNEY GENERAL'S MOTION FOR JURY DETERMINATION OF AGGRAVATING CIRCUMSTANCES UNDER *BLAKELY v. WASHINGTON*

Pursuant to Rule 19.1(b), Arizona Rules of Criminal Procedure, Plaintiff, the State of Arizona, requests a jury determination whether an aggravating circumstance exists, or aggravating circumstances exist, in this case warranting an aggravated sentence. If the jurors find beyond a reasonable doubt that at least one aggravating circumstance exists, this Court, in determining the appropriate sentence, may then consider in aggravation any fact relating to the character of the defendant or the nature and circumstances of the crime and weigh them against mitigating circumstances. The attached Memorandum of Points and Authorities supports this request.

MEMORANDUM OF POINTS AND AUTHORITIES

The State requests that this Court require the jurors to determine whether aggravating circumstances exist in this case pursuant to Rule 19.1(b), Arizona Rules of Criminal Procedure. Although A.R.S. § 13B702(B) provides that *this Court* shall determine the existence of aggravating circumstances for sentencing purposes, the United States Supreme Court's decision in *Blakely v. Washington*, 2004 WL 1402697 (U.S. Sup. Ct. June 24, 2004), casts serious doubt on the constitutionality of that procedure to the extent that it increases the range of sentence. *Blakely* holds that the Sixth Amendment to the United States Constitution requires that "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely* at 4 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Because the existence of aggravating circumstances increases the range of sentence this Court may impose on the defendant, the jurors, rather than

this Court, must determine the existence of an aggravating circumstance beyond a reasonable doubt.[1]

This Court may satisfy this constitutional mandate by employing Rule 19.1(b), Arizona Rules of Criminal Procedure. Rule 19.1(b) provides that, in a prosecution in which a noncapital sentencing allegation must be proved to the jurors, the jurors shall first try the defendant on the criminal charge with no mention of, instruction on, or evidence received on the sentencing allegation. If the jurors find the defendant guilty of the criminal charge, then they shall also try whether the sentencing allegation is true. Rule 19.1(b)(2), Ariz. R. Crim. P.

In this case, the State has alleged the following aggravating circumstances that supports an aggravated [or super-aggravated] sentence: [LIST CIRCUMSTANCES WITH SPECIFIC REFERENCE TO THEIR CORRESPONDING STATUTORY SUBSECTIONS SET FORTH IN A.R.S. § 13B702(C)]. The State requests that this Court submit those circumstances to the jurors and instruct them to determine whether each individual circumstance is true beyond a reasonable doubt. Along with the instant motion, the State has submitted a set of instructions that it believes should be read to the jurors.

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1. In contrast, jurors are not required to find mitigating circumstances, because they *decrease*, rather than *increase*, the defendant's punishment. *Apprendi* does not affect the constitutionality of allowing *trial courts* to determine the existence of mitigating circumstances by a preponderance of the evidence. Judicial findings of mitigating circumstances do not violate the Sixth Amendment because they "neither expos[e] the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor [do they] impos[e] upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent." *Apprendi*, 530 U.S. at 490 n.16, 120 S. Ct. at 2363 n.16.

If the jurors find at least one aggravating circumstance to be true beyond a reasonable doubt, this Court must impose an aggravated sentence within the statutory range unless the defendant has proved the existence of mitigating circumstances that are sufficiently substantial to call for a lesser sentence. A.R.S. § 13B702(D). This Court may also impose a "super-aggravated" sentence according to the range set forth in A.R.S. § 13B702.01 if the jurors find two or more "substantial" aggravating circumstances. In determining the appropriate sentence to impose once one or more aggravating circumstances are found beyond a reasonable doubt, this Court is not limited to considering only the aggravating circumstances the jurors found beyond a reasonable doubt, but may consider any fact relevant to the character of the defendant or the nature of his crime. *State v. Long*, 207 Ariz. 140, 147, & 39, 83 P.3d 618, 625 (App. 2004); *State v. Elliget*, 177 Ariz. 32, 36, 864 P.2d 1064, 1068 (App. 1993).

This procedure satisfies *Blakely* and its progenitor, *Apprendi*. The Supreme Court's concern in *Apprendi* was that states, in violation of the Sixth Amendment, were enacting sentencing statutes that increased the range of sentences defendants faced based on facts not found by a jury beyond a reasonable doubt. The Court stated in *Blakely* that "'the statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 2004 WL 1402697 at 4. Once the jury's verdict reflects the finding of a single aggravating circumstance, the "statutory maximum" expands to the current sentencing range under A.R.S. § 13B702; a jury finding of at least two "substantial" aggravating circumstances expands the "statutory maximum" to the "super-aggravated" range set forth in A.R.S. § 13B702.01.

This procedure ensures constitutional sentences under *Apprendi*, which holds that, with the exception of the fact of a prior conviction, "any fact that increases the penalty for a crime *beyond the statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 [emphasis added]. The Supreme Court carefully noted in *Apprendi* that trial courts are free to consider *any* relevant evidence in deciding the appropriate sentence *within the statutory range*:

> We should be clear that nothing in [the history of the right to a jury trial] suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to the offense and offender – in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.

Id. at 481 [emphases in original]; *see also Jones v. United States*, 526 U.S. 227, 248 (1999) ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury[.]"). The Supreme Court further noted that, "if the law has given the court discretion as to the punishment, it will look in pronouncing sentence into *any* evidence proper to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict." *Apprendi*, 530 U.S. at 482 n.9 (quoting 1 J. Bishop, Criminal Law ə 948 (9th ed. 1923)) [emphasis added].

The Supreme Court made its point clear in *Harris v. United States*:

> Yet not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence *within a range provided by statute*, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements.

536 U.S. 545, 549 (2002) [emphasis added]. As long as a fact considered does not increase the range of a defendant's possible sentence, reliance on that fact does not violate a defendant's Sixth Amendment right, even though the fact may be "stigmatizing and punitive." "Judges, in turn, have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for in the acts charged.'" *Id.* at 562 (quoting 1 J. Bishop, Criminal Law § 85). The Arizona Court of Appeals has also recognized this point, noting that *Apprendi* does not prohibit trial courts from considering "various factors related to the offense and the offender when it imposes a sentence *within the range of punishment* prescribed by the statute." *State v. Tschilar*, 200 Ariz. 427, & 18, 27 P.3d 331 (App. 2001) [emphasis added]. In *Blakely*, the Supreme Court extended the principles of *Apprendi* to sentencing schemes such as Arizona's, in which the trial court – rather than a jury – made findings regarding aggravating circumstances that increased the range of sentence defendants faced for particular criminal conduct. 2004 WL 1402697 at 4. However, *Blakely* did not change the principle that reliance on facts that influenced the trial court's discretion *within a statutory range* was consistent with the Sixth Amendment.

Based on this analysis, once the jury finds at least one aggravating circumstance alleged and listed in A.R.S. § 13B702(C), the defendant becomes eligible to receive an aggravated sentence, and if the jury finds two or more "substantial" aggravating circumstance, the defendant becomes eligible to receive a "super-aggravated" sentence under A.R.S. § 13B702.01. This Court may then consider *any* fact that is relevant to the defendant's character or the nature of his crime to determine the appropriate sentence

within that aggravated or “super-aggravated” range. The only restrictions are that this Court must find the facts to be true and set forth on the record its findings “and reasons in support of such findings.” A.R.S. § 13B702(B).